

1 **I. Background**

2 A. The parties

3 Plaintiff Avid Dating Life, Inc., doing business as Ashley
4 Madison, operates the online dating website www.ashleymadison.com.
5 (FAC ¶ 4.) Plaintiff Established Men, Inc. ("EMI") operates online
6 dating websites, including www.establishedmen.com and
7 www.arrangementfinders.com. (Id. ¶ 5.) EMI formerly operated
8 www.arrangementseekers.com. (Id.) Plaintiff Avid Life Media, Inc.
9 (collectively with Ashley Madison and EMI, "Avid") owns both Ashley
10 Madison and EMI. (Id. ¶¶ 3-5.)

11 Ashley Madison was launched in 2002; it is designed to
12 facilitate discreet, extra-marital relationships in an online
13 environment, with the possibility that the online relationship will
14 mature into a physical meeting. (Id. ¶ 18; Declaration of Noel
15 Biderman in Opposition to the Motion to Strike ¶ 6; Declaration of
16 Rizwan Jiwan in Opposition to the Motion to Strike ¶ 4.) The
17 website attracts approximately 72 million United States visitors
18 each year. (FAC ¶ 18.) Avid claims that Ashley Madison has
19 designed and developed, and is the owner of, a famous,
20 non-functional trade dress to promote Ashley Madison on print,
21 Internet, and billboard advertisements throughout the United
22 States. (Id. ¶¶ 19-21.) Specifically, the trade dress depicts a
23 woman with her finger press against her sealed lips (the "Shush
24 Image") (Id. ¶ 20; Biderman Decl. ¶ 7; Jiwan Decl. ¶ 4.) Avid
25 claims that the Shush Image is inherently distinctive and has
26 acquired secondary meaning, and that a substantial segment of the
27 consuming public makes a mental association between the Shush Image
28 and Ashley Madison. (FAC ¶¶ 21, 23.)

1 EMI's online dating website, www.arrangementfinders.com, is
2 designed to facilitate men and women entering into mutually
3 beneficial "social arrangements." (Id. ¶ 25.) Avid claims that
4 EMI has used the term "Arrangement Finders" as a source identifier
5 and as a trademark in connection with its services and website
6 since 2011. (Id.)

7 Defendant Infostream Group, Inc. operates dating websites,
8 including seekingarrangement.com and whatsyourprice.com. (Id. ¶6.)
9 Defendant Lead Wey, also known as, Brandon Wade, (collectively with
10 Infostream Group, "Infostream") is the founder and CEO of
11 Infostream Group. (Id. at ¶ 7.) Infostream owns the registered
12 trademarks "Seeking Arrangement" and "Mutually Beneficial
13 Relationships" in the United States and uses those marks in
14 connection with its services and websites. (See Settlement
15 Agreement, Mot. to Dismiss, Ex. A.) Infostream launched
16 seekingarrangement.com in 2006 to promote "mutually beneficial
17 relationships" between members who are referred to as either sugar
18 daddies, sugar mommies, or sugar babies. (FAC ¶ 26.) In 2011,
19 Infostream launched whatsyourprice.com, which allows its members to
20 buy and sell the opportunity of going out on a first date. (Id.)

21 B. Prior Litigation and the Settlement Agreement

22 In 2010, Infostream sued Avid in the United States District
23 Court for the Central District of California for, among other
24 things, trademark infringement, trademark dilution, and unfair
25 competition based on Avid's alleged use of Infostream's "Seeking
26 Arrangement" and "Mutually Beneficial Relationships" marks. (See
27 generally No.CV 10-05166 VBF (FMO)). Avid filed counterclaims for
28 cancellation of trademark and a separate action against Infostream

1 in Canada for breach of contract. (SAC ¶ 40). The parties
2 ultimately dismissed all claims against each other, pursuant to a
3 written settlement agreement (the "Agreement" or "Settlement
4 Agreement").

5 Under the Settlement Agreement, neither party admitted any
6 liability, obligation, misconduct, or wrongdoing of any kind in
7 connection with the underlying claims. (Id. ¶ 10.) The Settlement
8 Agreement further stated that the parties denied and contested the
9 claims and that the parties entered into the Settlement Agreement
10 "entirely as a compromise for the purpose of settlement of the
11 disputes . . . , to avoid the annoyance and expense of disputation
12 or litigation and to compromise, settle and extinguish all claims,
13 acts, damages, demands, rights of action and causes of action."
14 (Id.)

15 The Agreement provided that Avid would pay Infostream sixty
16 thousand dollars. (Id. ¶ 2.) Avid further agreed not to challenge
17 the validity of Infostream's "Seeking Arrangement" mark or the
18 "Mutually Beneficial Relationships" mark "so long as those marks
19 are used only within the 'Sugar Daddy' vertical market." (Id. ¶
20 1.) Avid also agreed to discontinue using the terms
21 "'ArrangementSeekers' (or an iteration or confusing similar
22 combination of the words 'arrangement' and 'seek') and 'Mutually
23 Beneficial Relationship' in any manner." (Id. ¶ 2.) Avid further
24 covenanted to transfer the domains "arrangementseekers.com"
25 and "arrangementseekers.net" to Infostream. (Id. ¶ 2.) The Parties
26 expressly agreed that "(1) the name 'Arrangement Finders' shall
27 serve as a suitable alternative which does not infringe upon the
28 Seeking Arrangement Mark; and (2) the term 'Mutually Beneficial

1 Arrangements' shall serve as a suitable alternative which does not
2 infringe upon the Mutually Beneficial Relationships Mark." (Id.)

3 Infostream, for its part, agreed to discontinue using "any of
4 [Avid]'s Intellectual property including . . . brand images,
5 trademarks (including, without limitation the Ashley Madison Mark
6 . . . , Established Men, confusingly similar website layouts, and/or
7 trade dress" (Id. ¶ 3.)

8 As defined by the Agreement, the term "using" was to have "the
9 broadest interpretation possible," and included any commercial use
10 of prohibited terms. "Using" also included, but was not limited
11 to, imitating and copying prohibited terms, employing prohibited
12 terms as meta-tags or in keyword stuffing, and advertising, e.g.,
13 through Google Adwords, with the prohibited terms. (Id. ¶ 4.) The
14 Agreement included a further, catch-all definition of "using" as
15 "engaging in any other activity constitution an infringement of the
16 other Party's intellectual property rights." (Id. ¶ 4(f).)
17 The Parties also mutually agreed to "cease and desist from making
18 public disparaging comments about each other's businesses,
19 reputations, websites or services" and not to "defame or imply
20 negative information via internet, in person or [] through any
21 other media and digital media means." (Id. ¶ 5.)

22 Avid maintains that the Settlement Agreement is confidential.
23 (FAC ¶ 35.) The Settlement Agreement does not contain a
24 confidentiality or non-disclosure provision, but does include
25 preambulatory language stating, "THIS CONFIDENTIAL AGREEMENT
26 (the "Agreement") is made" by and between Infostream and AvId. (DE
27 44-lat 1.) In addition, the Settlement Agreement further states
28 that "[t]he terms of the mutual release . . . shall not affect or

1 in any way alter the parties' rights, obligations, covenants,
2 promises or interests created under or pursuant to this Agreement
3 (including in particular, but without limitation, any obligation to
4 . . . keep confidential this Agreement or the terms thereof) . . .
5 ." (Id. ¶8.)

6 C. Alleged Breaches

7 Avid alleges that Infostream breached the Settlement Agreement
8 by displaying Ashley Madison's trade dress, specifically the Shush
9 Image, on the seekingarrangement.com website, and by repeating and
10 publicizing that website through the press. (FAC ¶¶ 37, 38 and
11 Ex."B.")

12 Avid also alleges that Infostream breached the Settlement
13 Agreement by displaying and bidding on Avid's intellectual property
14 in internet advertising. (Id. ¶ 39.) For example, the FAC alleges
15 that a Google search for Avid's term "arrangementfinders" resulted
16 in the display of a paid advertisement for Infostream's
17 www.seekingarrangement.com website. (Id.) Avid alleges that the
18 use of Avid's "arrangement finders" intellectual property is likely
19 to create a false impression that seekingarrangement.com is
20 affiliated with Avid. (Id.)

21 The FAC further alleges that Infostream breached its
22 obligations under the Settlement Agreement by disclosing the terms
23 of the Settlement Agreement and making disparaging and negative
24 statements about Avid in a separate lawsuit against PayPal, Inc.
25 (Id. ¶¶ 40-43.) Avid alleges that Infostream falsely accused Avid
26 of running the same types of businesses as Infostream, engaging in
27 illegal conduct, forming an anti-competitive economic relationship
28 with PayPal, and facilitating antitrust violations. (Id. ¶¶

1 41-43.) Avid also alleges that Infostream further breached the
2 Settlement Agreement by actively disseminating its statements and
3 implications made in the PayPal litigation to the press and other
4 non-participants in the PayPal litigation via the Internet, in
5 person, or through media or digital means. (Id. ¶¶ 44-47.)

6 The FAC also alleges that Defendant Wey gave an interview,
7 subsequently posted online, in which he stated that "[Infostream]
8 ha[s] sued a huge company, Ashley Madison, in federal court for
9 infringing on our trademark. The fact that we are building such a
10 brand implies that we need to protect it. We are successful in
11 stopping them from using a website that was too similar to ours."
12 (Id. ¶ 51.)

13 Avid alleges that it gave notice to Infostream demanding that
14 Infostream cure the breach pursuant to paragraph 15 of the
15 Settlement Agreement. Infostream did not respond to the demand.
16 (Id. ¶ 50.) Avid then filed the instant action, which asserts
17 claims against Infostream for (1) breach of written contract,
18 (2) defamation, and (3) declaratory relief. Infostream now moves to
19 dismiss, and to strike pursuant to California's Anti-SLAPP statute.

20 **II. Legal Standard**

21 A complaint will survive a motion to dismiss when it
22 contains "sufficient factual matter, accepted as true, to state a
23 claim to relief that is plausible on its face." *Ashcroft v. Iqbal*,
24 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550
25 U.S. 544, 570 (2007)). When considering a Rule 12(b)(6) motion, a
26 court must "accept as true all allegations of material fact and
27 must construe those facts in the light most favorable to the
28 plaintiff." *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000).

1 Although a complaint need not include "detailed factual
2 allegations," it must offer "more than an unadorned,
3 the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at
4 678. Conclusory allegations or allegations that are no more than a
5 statement of a legal conclusion "are not entitled to the assumption
6 of truth." *Id.* at 679. In other words, a pleading that merely
7 offers "labels and conclusions," a "formulaic recitation of the
8 elements," or "naked assertions" will not be sufficient to state a
9 claim upon which relief can be granted. *Id.* at 678 (citations and
10 internal quotation marks omitted).

11 "When there are well-pleaded factual allegations, a court
12 should assume their veracity and then determine whether they
13 plausibly give rise to an entitlement of relief." *Id.* at 679.
14 Plaintiffs must allege "plausible grounds to infer" that their
15 claims rise "above the speculative level." *Twombly*, 550 U.S. at
16 555. "Determining whether a complaint states a plausible claim for
17 relief" is a "context-specific task that requires the reviewing
18 court to draw on its judicial experience and common sense." *Iqbal*,
19 556 U.S. at 679.

20 **III. Discussion**

21 **A. Breach of Contract Claim**

22 **1. Performance**

23 The elements of a cause of action for breach of contract are
24 1) the existence of a contract, 2) plaintiff's performance or
25 excuse for nonperformance, 3) defendant's breach, and 4) damages.
26 *Reichert v. Gen. Ins. Co. of Am.*, 68 Cal.2d 822, 830 (1968). The
27 FAC alleges that Avid performed all conditions under the Agreement,
28 except those excused by Infostream's conduct. (SAC ¶ 57.)

1 Infostream argues that Avid's averments of performance are
2 insufficient. (Reply at 3.)

3 "[T]his court need not accept as true conclusory allegations
4 that are contradicted by documents referred to in the complaint."
5 Colony Cove Properties, LLC v. City of Carson, 640 F.3d 948, 955
6 (9th Cir. 2011). Infostream points to a variety of documents that,
7 it argues, establish that Avid failed to perform its obligations
8 under the Agreements. First, Infostream cites to Exhibits A and B
9 of the FAC. Exhibits A and B are Avid's and Infostream's
10 respective uses of an image of a woman holding her index finger to
11 her pursed lips (i.e., the Shush Image). The FAC alleges that the
12 Shush image is Avid's trade dress. (FAC ¶ 20).

13 Rather than accept that allegation as true, Infostream argues
14 that it is the owner of the Shush Image trade dress. (Mot. at 12.)
15 It is unclear to the court, however, how Exhibit B, which Avid
16 alleges to be Infostream's infringing use of the Shush Image,
17 contradicts Avid's allegation of trade dress ownership. Infostream
18 attempts to bolster its argument by asking this court to take
19 judicial notice of a more or less identical image pulled from an
20 Infostream website in 2006. The mere fact that an image was
21 displayed on a website at a certain time, however, cannot
22 conclusively establish ownership of the trade dress one way or
23 another. While the disputed fact of ownership may or may not be
24 resolvable on summary judgment, it cannot be determined at this
25 stage.

26 Infostream also attempts to establish Avid's nonperformance by
27 requesting judicial notice of other documents. Specifically,
28 Infostream asks that this court take notice of its own Second

1 Amended Complaint in a related case, No. CV 12-9315 (DDP), briefs
2 filed in that related case, and several screenshots of search
3 results taken from various websites at various times. (RJN at
4 3-4.)

5 As an initial matter, arguments made by Avid's counsel in
6 support of a motion to dismiss in the related case, wherein Avid
7 was required to accept Infostream's allegations as true, do not
8 constitute admissions. See Shiley, Inc. v. Bentley Labs., Inc.,
9 115 F.R.D. 169, 171 (C.D. Cal. 1987). Furthermore, the search
10 engine results, which purportedly demonstrate Avid ads resulting
11 from a search for Infostream marks, do not necessarily establish
12 that Avid breached the Agreement by purchasing Infostream marks as
13 keywords. In the absence of any documents clearly contradicting
14 Avid's allegations of performance, those allegations are entitled
15 to the presumption of truth.¹

16 2. Breach

17 Infostream further argues that the FAC fails to adequately
18 allege that Infostream breached the Settlement Agreement.

19 a. Nondisparagement

20 i. The Paypal Litigation

21 In the Settlement Agreement, the parties agreed to "cease and
22 desist from making public disparaging comments about each other's
23 businesses, reputations, websites or services" and not to "defame
24 or imply negative information via internet, in person or [] through
25 any other media and digital media means." The FAC alleges that

26
27 ¹ The court also notes that when asked whether the FAC alleges
28 that Avid performed for at least some period subsequent to the
signing of the Agreement, Defendants' counsel responded that the
answer involves an issue of fact.

1 Infostream breached this nondisparagement clause. In a suit
2 against PayPal, to which Avid was not a party, Infostream alleged
3 in its pleadings that Avid, among other things, engaged in
4 anticompetitive behavior. The FAC also alleges that Infostream
5 repeated comments suggesting that Avid facilitates prostitution,
6 that Infostream disseminated these disparaging statements to the
7 press in person, on the internet, and on the radio. (FAC ¶¶ 40-46,
8 Opp. At 9.)

9 Infostream argues that its statements related to the PayPal
10 action are protected by the litigation privilege. California's
11 litigation privilege applies to communications "(1) made in
12 judicial or quasi-judicial proceedings; (2) by litigants or other
13 participants authorized by law; (3) to achieve the objects of the
14 litigation; and (4) that have some connection or logical relation
15 to the action." Wentland v. Wass, 126 Cal.App.4th 1484, 1490
16 (2005); Cal. Civil Code § 47(b). While communications to news
17 media are not necessarily protected, publication of statements
18 outside the courtroom may be privileged to the extent they discuss
19 the pendency of the litigation. See Epicor Software Corp. V.
20 Alternative Tech. Solutions, Inc., No. SACV 13-448-CJC, 2013 WL
21 3930545 at *5 (C.D. Cal. June 21, 2013). Parties may, however,
22 waive the protections of the privilege by contract. Wentland, 126
23 Cal.App.4th at 1494.

24 This is not to say that the privilege immunizes all
25 communication made in relation to litigation, nor that contractual
26 language will always trump the litigation privilege. See Id.
27 ("The litigation privilege has never shielded one from all
28 liability."); T.T. ex rel. Susan T. v. County of Marin, No. C. 12-

1 2349 WHA, 2013 WL 308908 at *5 (N.D. Cal. Jan. 25, 2013) ("Where
2 the communication at issue is a separate promise independent of the
3 litigation . . . the litigation privilege may not apply."); Zopatti
4 v. Rancho Dorado Homeowners Assoc., No. 10CV1091 DMS, 2010 WL
5 5174534 at *3 (S.D. Cal. Dec. 15, 2010) (finding litigation
6 privilege inapplicable to breach of contract claim). Rather,
7 "whether the litigation privilege applies to an action for breach
8 of contract turns on whether its application furthers the policies
9 underlying the privilege." Wentland, 126 Cal.App.4th at 1492.
10 These policies include the promotion of full and truthful
11 testimony, zealous advocacy, free access to the courts, and the
12 finality of judgments. Id.

13 Here, to immunize Infostream's disparaging statements would not
14 further the policies underlying the litigation privilege. The
15 language of the Settlement Agreement makes clear that the parties
16 intended it be comprehensive, releasing each other from all claims
17 "known and unknown, accrued or unaccrued, of every nature and kind
18 whatsoever . . . arising from or in any way connected with any
19 events, facts, or circumstances . . . pertaining to those events,
20 facts or circumstances alleged (or which could have been alleged
21 in)" the prior litigation. (Agreement at 4 ¶ 7.) Nevertheless,
22 less than four months after entering into the Agreement, Infostream
23 proceeded to make disparaging remarks regarding alleged acts
24 committed by Avid prior to the Agreement's recent execution. To
25 insulate these statements with the litigation privilege would
26 render the Agreement largely meaningless, would ignore the
27 comprehensive language therein, and would hardly promote the
28 finality of the judgment resulting therefrom. Further, Infostream

1 does not adequately explain how its explicit references to Avid
2 were necessary to or aided its efforts against PayPal. Because
3 application of the litigation privilege here would frustrate rather
4 than further its underlying policies, Avid's breach of contract
5 claim is not barred.

6 ii. The Wey Interview

7 In a seven-page interview posted to an internet website,
8 Defendant Lead Wey said, "[Infostream] ha[s] sued a huge company,
9 Ashley Madison, in federal court for infringing on our trademark.
10 The fact that we are building such a brand implies that we need to
11 protect it. We are successful in stopping them from using a
12 website that was too similar to ours." The FAC alleges that these
13 statements also constituted a breach of the Agreement's
14 non-disparagement provision. (FAC ¶ 51.) Though Infostream argues
15 that the FAC insufficiently pleads breach, it focuses its argument
16 on the statements related to the PayPal litigation, with no
17 discussion of Avid's allegations that Wey's interview statements
18 also constituted a breach of the Agreement. Instead, Infostream
19 discusses Wey's statements in the context of Avid's Second Cause of
20 Action for defamation, discussed below.

21 b. Confidentiality

22 The FAC alleges that Infostream breached its confidentiality
23 obligations under the Agreement. (FAC ¶ 60.) Infostream's Motion
24 contends that the Agreement is not confidential, pointing to the
25 lack of any confidentiality provision. Avid's opposition does not
26 address the confidentiality issue or oppose Infostream's motion to
27 dismiss the confidentiality claim. Accordingly, Avid's claim for
28 breach of contract based on breach of confidentiality is dismissed.

1 c. Use of Keywords

2 Infostream also argues that the FAC does not sufficiently
3 allege breach based on Infostream's alleged use of Avid's
4 intellectual property in keyword advertising. (Mot. At 17.)
5 Infostream argues that such claims must be supported by screenshots
6 of advertisements appearing when users search for a protected mark.
7 (Id.) Infostream is mistaken. While some plausible claim of
8 consumer confusion is necessary to maintain a claim for trademark
9 infringement, Avid brings no such claims here. See Network
10 Automation Inc. v. Advanced Sys. Concepts, Inc., 638 F.3d 1137,1153
11 (9th Cir. 2011). Avid's claim for breach of the Agreement's
12 non-use provisions is adequately pled.

13 d. Trade Dress

14 Lastly, Infostream argues that Avid's breach of contract claim
15 based on Infostream's alleged use of Avid's Shush Image trade dress
16 must be dismissed because Infostream owns the trade dress. As
17 explained above, absent any documents conclusively contradicting
18 Avid's ownership claim, this court must accept all of Avid's
19 allegations as true.

20 For these reasons, Infostream's Motion to Dismiss the breach
21 of contract claim is denied, in substantial part. The motion is
22 granted, however, with respect to Avid's claim based upon breach of
23 confidentiality, which is dismissed.

24 B. Defamation Claim

25 As described above, Wey gave an interview in which he stated,
26 "[Infostream] ha[s] sued a huge company, Ashley Madison, in federal
27 court for infringing on our trademark. The fact that we are
28 building such a brand implies that we need to protect it. We were

1 successful in stopping them from using a website that was too
2 similar to ours." Avid alleges that this statement is defamatory.

3 Defamation involves the intentional publication of a false,
4 unprivileged, injurious statement. Smith v. Maldonado, 72
5 Cal.App.4th 637, 645 (1999). Truth of the allegedly defamatory
6 statement is, therefore, a complete defense. Harrel v. George, No.
7 CIV S-55-036 MCE DAD, 2012 WL 3647941 at *9 (E.D. Cal. Aug. 22,
8 2012). "[I]t is sufficient if the defendant proves true the
9 substance of the charge, irrespective of slight inaccuracy in the
10 details, so long as the imputation is substantially true so as to
11 justify the gist or sting of the remark." Id. (internal quotations
12 and citations omitted). A statement is not substantially true,
13 however, if it would have a different effect on the mind of the
14 audience from that which the pleaded truth would have produced.
15 Masson v. New Yorker Magazine, Inc., 504 U.S. 496, 517 (1991);
16 Metabolife Int'l, Inc. v. Wornick, 264 F. 3d 832, 849 (9th Cir.
17 2001).

18 The FAC alleges that "Defendants were not successful in any
19 litigation with Ashley Madison for infringing Defendants' trademark
20 and Defendants were not successful in any litigation with Ashley
21 Madison by stopping Ashley Madison from 'using a website that was
22 too similar to' Defendants website." (FAC ¶ 69.) The crux of
23 Avid's defamation claim, therefore, is Wey's statement that, "We
24 were successful in stopping [Ashley Madison] from using a website
25 that was too similar to ours."

26 Avid argues that a true statement would have read something
27 like, "Infostream sued Avid Life Media, Ashley Madison, and EMI in
28 federal court for trademark infringement, and they settled the

1 lawsuit where the parties each received benefits and had
2 obligations. Included in the settlement was the transfer of
3 certain domains from EMI." (Opp. at 21.) While Wey did not
4 explicitly mention the settlement, nor did he, as Avid would
5 suggest, state that Infostream was successful in its litigation
6 against Ashley Madison. Rather, Wey stated that Infostream stopped
7 Ashley Madison from using a website similar to Infostream's.

8 Avid argues that Infostream only stopped EMI, not Ashley
9 Madison, from using a website. (Opp. at 18.) That
10 characterization, however, is not entirely accurate. "Ashley
11 Madison" is the business name of Plaintiff Avid Dating Life, Inc.
12 The Settlement Agreement states that Avid Dating Life, Inc., Avid
13 Life Media Inc., and EMI may collectively be referred to as the
14 "Avid Parties." Under the Agreement, the "Avid Parties," which
15 includes both EMI and Ashley Madison, agreed to assign all rights
16 to arrangementseekers.com and arrangementseekers.net to Infostream.
17 Thus, while the Agreement may not have stopped Ashley Madison from
18 using certain websites in the sense of forcing Ashley Madison to
19 cease current operations, it did prevent Ashley Madison from
20 prospectively using the websites at issue. Under such
21 circumstances, any slight inaccuracies in Wey's statements
22 regarding the distinction between EMI and Ashley Madison did not
23 produce a different effect than a more precise statement would
24 have. Because Wey's statement was substantially true, Avid's
25 defamation claim must be dismissed.

26 C. Declaratory Judgment Claim

27 Because Avid's breach of contract claim will resolve all
28 claims regarding the contract and may provide Avid with the relief

1 it seeks with respect thereto, Avid's claim for a declaratory
2 judgment is dismissed. See Streamcast Networks, Inc. v. IBIS LLC,
3 No. CV 05-4239 MMM, 2006 WL 5720345 at *3-4 (C.D. Cal. May 2,
4 2006).

5 D. Anti-SLAPP

6 The court does not separately address the arguments raised
7 with respect to Defendants' anti-SLAPP Special Motion to Strike
8 because the outcome would be the same as under the Rule 12(b)(6)
9 analysis. A motion to dismiss and an anti-SLAPP motion may be, but
10 are not necessarily, intertwined. Hilton v. Hallmark Cards, 599
11 F.3d 894, 902 (9th Cir. 2010)¹; See, e.g., Davis v. Electronic Arts
12 Inc., No. 10-3328 RS, 2012 WL 3860819 (N.D. Cal. Mar. 29, 2012).

13 Under California Code of Civil Procedure Section 425.16, a
14 defendant must first make a showing that the plaintiff's suit
15 arises from some protected activity. Zamani v. Carnes, 491 F.3d
16 990, 994 (9th Cir. 2007). Once defendant makes such a showing, the
17 burden shifts to the plaintiff to make a prima facie case that he
18 will prevail. Id.

19 Here, the facts and arguments at issue in the two motions
20 overlap almost completely. Even assuming that all of Avid's claims
21 arise from Infostream's protected activities, Avid has demonstrated
22 a likelihood of prevailing on the contract claim, but not on the
23 defamation claim, for the reasons stated above.

24 E. Fraud Counterclaim

25 Infostream also brings a counterclaim for fraud against AvId.
26 Infostream alleges that in the course of the settlement
27 negotiations that ultimately led to the Agreement, Avid
28 misrepresented its earnings. But for those misrepresentations,

1 Infostream alleges, Infostream would have required a larger
2 financial payment from AvId.

3 As discussed above, the Agreement includes a mutual release
4 from "any and all claims . . . , known or unknown, accrued or
5 unaccrued, of every nature and kind whatsoever, which they or any of
6 them ever had . . . or may in the future have . . . arising from or
7 in any way connected with any events . . . through the present . .
8 ." (Agreement ¶ 7.) The parties also expressly agreed to waive
9 any undiscovered claims and any rights under California Civil Code
10 Section 1542, which otherwise excepts undiscovered claims from
11 general releases. The Agreement further states that it "represents
12 the entire understanding of the parties with respect to its subject
13 matter and supersedes all previous representations," and that the
14 parties each "had the opportunity to seek the benefit of
15 independent legal counsel . . . regarding the substance of this
16 Agreement." (Id. ¶¶ 11, 19.) Both parties were represented by
17 counsel. (Id. ¶ 18.)

18 "The elements of a fraud claim are false representation,
19 knowledge of falsity, intent to defraud, justifiable reliance, and
20 damages." City of Oceanside v. AELD, LLC, 740 F.Supp.2d 1183, 1191
21 (S.D. Cal. 2010). Avid argues that Infostream could not have
22 justifiably relied on any alleged misrepresentations regarding
23 Avid's earnings in light of the Agreement's specific language
24 superseding all prior representations and releasing Avid from all
25 claims of any nature whatsoever, including undiscovered claims.

26 This court agrees with Avid, and with those courts that have
27 held that express written language contradicting alleged oral
28 misrepresentations precludes a showing of justifiable reliance,

1 particularly where a reasonably diligent party could have
2 ascertained the truth. See Omni Home Financing, Inc. v. Hartford
3 Life and Annuity Insurance Co., No. 06cv0921 IEG, 2008 WL 1985248
4 at *4-5 (S.D. Cal. Apr. 29, 2008). This is particularly so where
5 the written provisions at issue are contained in a global
6 settlement agreement between sophisticated parties, which "cannot
7 reasonably be interpreted as leaving the door open to litigation
8 about the settlement negotiation process." Facebook, Inc. v.
9 Pacific Northwest Software, Inc., 640 F.3d 1034, 140 (9th Cir.
10 2011); See also Facebook, Inc. v. ConnectU, Inc., No. C 07-1389 JW,
11 2008 WL 8820476 at *5 (N.D. Cal. June 25, 2008) ("Where a party is
12 represented by counsel, or where the alleged misrepresentation was
13 made by an adversary during the course of negotiations, courts have
14 held that reliance is unjustifiable."); Salehi v. Surfside III
15 Condominium Owners' Ass'n., 200 Cal.App.4th 1146, 1160 (2011). In
16 light of the all-encompassing language of the Settlement Agreement,
17 which was drafted by counsel in the course of adversarial
18 litigation, Infostream cannot demonstrate justifiable reliance on
19 misrepresentations made during settlement negotiations.
20 Infostream's fraud counterclaim is dismissed with prejudice.

21 **IV. Conclusion**

22 For the reasons stated above, Defendants' Motion to Dismiss
23 and Motion to Strike are GRANTED, in part, and DENIED, in part.
24 Plaintiffs' breach of contract claim is DISMISSED only with respect

25 ///

26 ///

27

28

1 to breach of confidentiality. Plaintiffs' defamation claim,
2 however, is DISMISSED in its entirety, with prejudice. Defendants'
3 fraud counterclaim is also DISMISSED with prejudice.

4

5 IT IS SO ORDERED.

6

7

8 Dated: November 12, 2013

9


DEAN D. PREGERSON
United States District Judge

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28